UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17-cr-684 (ER)

CHRISTIAN DAWKINS and
MERL CODE,

Defendants. Conference

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New York, N.Y.
April 19, 2019
11:00 a.m.

Before:

HON. EDGARDO RAMOS

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
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ELI J. MARK, ESQ.
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(Case called)

THE CLERK: Counsel, please state your name for the record.

MR. BOONE: Good morning, your Honor. Robert Boone for the government. Here with me at counsel's table are Eli Mark and Noah Solowiejczyk.

MR. MARK: Good morning.

THE COURT: Good morning.

MR. MATHIAS: Andrew Mathias, here on behalf of Merl Code.

MR. HANEY: And -- good morning, your Honor -- Steve Haney on behalf of Mr. Dawkins, who appears here to my right. Would you care for him to stand and make an appearance?

THE COURT: No need.

MR. HANEY: Thank you, your Honor.

THE COURT: And I'm sorry, is it Mr. Mathias?

MR. MATHIAS: Yes, your Honor.

THE COURT: Do you want to make a record as to Mr. Code's presence?

MR. MATHIAS: Yes. Mr. Code is not here, and he waives his right to be here.

THE COURT: Very well.

There's been a lot of activity on the docket over the last couple of days. I think the last communications that I received from the parties concerned, what? Letters from

yesterday.

MR. BOONE: The letters from yesterday were regarding travel reimbursements.

THE COURT: That's right.

MR. BOONE: The issue is whether the government should be forced to turn over certain underlying documents relating to entrapment.

THE COURT: That's right. So this is what we're going to do. This matter is on for a final pretrial conference. I take it that we will be starting Monday; there is no possibly of any pleading between now and then, so far as the parties are concerned as they sit here?

MR. BOONE: The government is not aware of any interest in pleading.

MR. HANEY: That is correct, your Honor.

MR. MATHIAS: No, your Honor.

THE COURT: All right. So the first thing I will do is, I will rule on the substantive motions that have been made. I will give a very high-level discussion of how I rule, and then an opinion will follow. But essentially the defendants' motions, substantive motions, are denied. The first motion was a motion to dismiss the indictment. An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend; and, second, enables him to plead an

acquittal or conviction and bar future prosecutions for the same offense.

The superseding indictment here sufficiently states the offenses with which defendants are being charged and is therefore is facially valid. First, the indictment properly tracks the language of the statute by including the verbatim language of the relevant subsections, Subsections 666, 1343, 1346, 1349, and 1952. And the indictment also states the time and place and approximate terms of the alleged crimes by including details surrounding the alleged criminal interactions between the defendants and various NCAA coaches that were involved in the scheme, the dates that those meetings took place, and the amount of the bribes that were discussed and paid. The detailed account of defendants' alleged criminal conduct that was included in the superseding indictment is sufficient to inform the defendants of the crimes charged, allow them to prepare a defense, and if necessary allow them to plead double jeopardy in a later prosecution.

The superseding indictment also alleges, properly alleges, a federal funds bribery scheme. The defendants urge the Court to dismiss Counts One and Two on the grounds that the superseding indictment does not alleged a federal funds bribery scheme. When examined under the lens of the statutory language as well as the defendants in this case, Section 666 makes it a crime to "corruptly give, offer, or agree to give anything of

value to any person with intent to influence or reward an agent of an organization in connection with any business transaction or series of transactions of such organization involving anything of value of $5,000 or more when that organization receives in any one-year period benefits in excess of $10,000 under a federal program."

Defendants first claim that the federal funds bribery charge fails to allege that the coaches were acting as agents of the respective universities, the coaches that were the object of the defendants' scheme. The term "agent" is expressly defined in Section 666 as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee." Importantly, Section 666's statutory definition of "agency" is broader than its common law meaning. In the instant case, it is undisputed that the coaches whom defendants' bribed, or allegedly bribed, were employees of the respective universities at all times during the course of the alleged bribery scheme. Given that the section explicitly includes employees of an organization, it is clear that the coaches acted as agents within the meaning of the statute when they allegedly accepted the defendants' bribes.

Second, the defendants argue that even if the superseding indictment does allege that the coaches were agents of the respective universities, it fails to allege that the

coaches were acting within the scope of the agency. However, there is no basis in the statute to support their arguments. Section 666 imposes no requirement that the agents must be acting within the scope of their agency. Instead, defendants appear to be simply and erroneously alluding to a common law definition of "agency," which, as mentioned previously, differs from the statute's broader statutory definition.

Finally, defendants argue that they cannot be charged under Section 666 because their alleged conduct was not connected to any, quote, business or transaction of the university at issue.

And despite defendants' accurate statement that the universities are not in the business of recommending financial advisors to student athletes, the Court finds that the universities are in the business of running NCAA-compliant athletics programs, which would have a clear connection to defendants' alleged scheme. In fact, in the related prosecution before Judge Preska, she found that running an NCAA-compliant program was a business of the university.

The Court also finds that the superseding indictment properly alleges an honest services wire fraud. Defendants argue that Counts Three, Four, and Five should be dismissed because they fail to allege that any of the coaches, the three coaches, owed a fiduciary duty to their respective universities or, in the alternative, that even if they did owe a fiduciary

duty to their universities, the indictment fails to allege that they were acting within the scope of that duty.

As relevant to this case, the Second Circuit has held in *United States v. Nouri* that the existence of a fiduciary relationship between an employee and employer is beyond dispute and that the violation of that duty through the employee's participation in a bribery or kickback scheme is within the core of actions criminalized by Section 1346. In the instant case, the superseding indictment clearly alleges that the coaches whom the defendant allegedly bribed were employees of their respective universities at all relevant times. Accordingly, fiduciary relationships did in fact exist between the coaches and their respective universities.

The Court also finds that the coaches were acting within the scope of their fiduciary duty as alleged in the superseding indictment. The scope of the coaches' professional duties and responsibilities to their respective universities included compliance with NCAA rules, including prohibitions on facilitating contact between student athletes and agents or financial advisors. Accordingly, the coaches acted within the scope of their fiduciary duty when they allegedly facilitated such contact and received compensation related to this alleged scheme.

The Court also finds that the superseding indictment properly alleges a Travel Act conspiracy. The defendants argue

that Count Six should be dismissed because, although the coaches may have violated private NCAA rules, they were not involved in any organized crime or other criminal activity. Title 18 United States Code § 1952 applies to whoever travels in interstate or foreign commerce or uses the mails or any facility in interstate or foreign commerce with intent to distribute proceeds of an unlawful activity, or commit any crime of violence to further any unlawful activity, or otherwise promote, manage, establish, carry, or facilitate the profession, management, establishment, or carrying on of any unlawful activity. As relevant in this case, the statute itself defines "unlawful activity" to include, among other things, bribery. Here, defendants' alleged criminal conduct, involving bribery, falls squarely within the unlawful activity as defined by Section 1952, because the indictment asserts that defendants have violated both the federal funds bribery statute and several state commercial bribery statutes.

The Court also finds that the federal funds bribery and honest services wire fraud counts are not -- or statutes -- are not unconstitutional as applied. Defendants argue that the charges against them would violate due process because the statutes are unconstitutionally vague, both facially and if applied to the facts of their case.

The Supreme Court and the Court of Appeals have held that the honest services fraud statute is not

unconstitutionally vague. In *Skilling*, the Supreme Court held that the private-sector honest services fraud statute, as narrowed to encompass only bribery and kickback schemes, is not unconstitutionally vague. With regard to the federal funds bribery statute, in *United States v. Boyland*, the Second Circuit held that the *McDonnell* standard, i.e. an official act requirement, does not apply to Section 666 counts because Section 666 was intended to cover more expansive behavior than Section 201. Therefore, the federal funds bribery and honest services wire fraud statutes are not facially unconstitutional for vagueness.

Defendants claim that they lacked fair notice that their conduct might have been prohibited under these statutes. That argument is meritless because the Supreme Court stated in *Skilling*, "it has always been as plain as a pikestaff that bribes and kickbacks are prohibited."

Moving now to the motion to suppress the wiretap evidence, that motion is also denied. Defendants argue that the April 7 wiretap order is facially insufficient because it failed to identify by name on the appropriate line on the order the name of the Justice Department official who authorized the wiretap application. The government argues that the error on the order does not compel suppression of the wiretap evidence. The Court agrees. The April 7 wiretap order failed to identify the correct authorizing official in the dedicated space.

However, the order was based upon the application, which correctly identified the authorizing official. The Court agrees with those circuits that have found that a failure to identify, or misidentify, the wiretap's application authorizing official to be facially insufficient under the appropriate section, that need not be suppressed where an authorizing official in fact existed.

The Court also finds that the wiretap was supported by probable cause, contrary to defendants' argument that no probable cause existed to believe that any target was committing any of the target offenses. Probable cause for a wiretap order exists when the facts made known to the issuing court are sufficient to warrant a prudent person in believing that the evidence of a crime could be obtained through the use of electronic surveillance. Once a wiretap order has been issued, the order is entitled to a presumption of validity.

The April 7 wiretap order specified among others wire fraud under Section 1343 as a target offense. The Court finds that probable cause exists to believe that the defendants were committing honest services wire fraud. The government's application included an affidavit describing recorded phone calls involving Mr. Dawkins and CW-1 discussing the alleged bribery scheme and meetings in which CW-1 provided Mr. Evans with the cash bribes alleged. It also included detailed allegations regarding phone calls between Mr. Sood and CW-1

regarding anticipated meetings with two coaches in Las Vegas to determine that they would be willing to accept money in exchange for directing players to retain the services of Mr. Sood, Mr. Dawkins, and CW-1.

Defendants argue that the honest services wire fraud is not one of the target offenses in the application. The Court disagrees. The application lists wire fraud under 18 U.S.C. § 1343 as a target offense. Honest services fraud, which is defined in Section 1346, is one type of scheme or artifice to defraud that is outlined by Section 1343.

Defendants argue that all communications intercepted pursuant to the April 7 wiretap should be suppressed on the grounds that the wiretap was unnecessary, given the government's engagement with a cooperating witness. Here, however, the April 7 wiretap included over 13 pages outlining the applicants' rationale behind the need for the wiretap. Specifically, the application provides a basis for concluding that less-intrusive methods, including the use of physical surveillance and analysis of telephone records, were insufficient, given the nature of the investigation. It would not be feasible for the cooperating witness to record conversations in which he did not participate, of course. Therefore, the application met the requirements of necessity by providing a basis for the issuing judicial officer to conclude that the nature of the current case is such that neither the

use of a single cooperating witness nor less intrusive investigative procedures would have been feasible.

In addition, I find that the government was entitled to rely on the good faith of the April 7 order. The fruits of a wiretap which is later found to be insufficient will not be suppressed unless one of the following occurs: (1) the issuing judge abandoned his detached mutual role; (2) the agent was dishonest or reckless in preparing the supporting affidavit of the wiretap order; or (3) the agent's reliance on the warrant was not reasonable. I find that, in the instant case, none of these conditions for suppression have been met.

Turning now to the defendants' request for grand jury proceedings, for the transcripts, they contend that they're entitled to such transcripts because the indictment may have been based on the intercepted communications which they have sought to suppress. As I have concluded the suppression of the communications is not warranted, I need not consider defendants' argument as to the request for the grand jury transcript.

Defendants also move to suppress the cellphone evidence obtained after their arrest. That motion also is denied. They argue that all evidence obtained from the cellphones seized during their arrest and later search pursuant to judicially authorized warrants should be suppressed because the warrants were not supported by probable cause. Here, I

agree with Judge Kaplan, who addressed the identical motion in United States v. Gatto, where he denied the suppression, specifically the applications for search warrants each attached to complaint which identify calls and text messages in furtherance of the applicable crimes and which were made using one or more of the cellphones in question. Evidence of these calls and messages was sufficient to establish a fair probability that contraband or evidence of a crime would be found through the various content of the defendants' cellphones.

Turning now to the bill of particulars, request for a bill of particulars, I find that defendants are not entitled to such a bill. Given the level of detail that is contained in both the criminal complaint and the superseding indictment, defendants cannot properly claim that the charges alleged against them are so general that they do not advise them of the specific acts of which they are accused. Specifically, the complaint and indictment describe in detail the alleged criminal interactions between defendants and the various NCAA coaches that were involved in the scheme. These details include the dates when the meetings took place, the amount of the bribes that were discussed and paid, and the approach that defendants took to identify and establish relationships with the coaches.

In addition, the discovery material which is available

to defendant, including hours of incriminating phone calls, serves to further give notice to defendants about the charges against them and prevents them from being surprised at trial or claiming double jeopardy.

Accordingly, that motion is denied.

The balance of the motions concern discovery, which I assume has been provided as of now, Mr. Boone?

MR. BOONE: Yes, your Honor.

THE COURT: OK. Turning now to the motions in limine that have been filed first with respect to the entrapment defense, Mr. Haney, did you wish to speak any further with respect to that motion?

MR. HANEY: Yes, just briefly, your Honor. I don't need my notes. This will be a rather straightforward, I think, conversation.

First of all, thank you, your Honor, for having me in your courtroom. I understand that out-of-jurisdiction attorneys have no right to be here; it's a privilege. And I want to thank you the Court for allowing me to be in your jurisdiction.

THE COURT: You're welcome.

MR. HANEY: Thank you, sir.

Now, we've had conversation, myself and the government, recently, about this issue of the entrapment. Though I believe it's supported factually based on what I've

submitted in the responsive pleadings, we would agree that it is a bit premature, that that issue may be better determined at the end of proofs and the Court then could make a determination of whether or not the Court believes that, based on the proofs that have been presented, whether or not entrapment occurred and a charging instruction would be appropriate to the jury. Now, that's my position. I've had this conversation as recently as yesterday with counsel from the government, and I would submit that they agree with that and would leave to the Court's discretion at the appropriate time to make that determination.

THE COURT: Very well.

MR. HANEY: Thank you, your Honor.

THE COURT: And I'm happy to hear you at the appropriate time.

Then the government seeks to preclude defendants from adducing evidence that they did not bribe other men's college basketball coaches who remain uncharged, on relevance grounds. Mr. Boone or one of your colleagues, does either one of you want to speak further on this issue?

MR. MARK: Your Honor, I think we have laid that out fairly in our motion, that it appears that the defense, by their subpoenas and by their motion, intends to call witnesses and adduce evidence regarding the defendants' relationships with other coaches who are not part of this bribery scheme.

That appears to be clearly irrelevant as it is outside the scope of their criminal conduct and it doesn't bear upon whether the defendants actually intended to and did bribe the coaches that are at issue here. And as a result, we think not only is it irrelevant, but it would pose other issues and should be precluded under 403.

THE COURT: Does either defendant want to respond?

MR. HANEY: I would, your Honor. And I would like to, at the Court's pleasure, elaborate on that just a minute if I might.

THE COURT: Sure.

MR. HANEY: Your Honor, we have what I submit is troubling -- there's no other word for what it is -- evidence in this case that we have two head coaches that are engaged in systematic cheating at the highest level. Now, not only is there evidence of that; there's evidence that my client is on the phone with those coaches, and there's also evidence that my client has a very close relationship with those coaches, and I would submit the jury could make that determination by and through the context of the conversations and the language that they're using and the things that they're talking about, your Honor.

Now, this information, this evidence, would not be submitted to show character. It would show my client's intent. My client is charged with bribing assistant coaches, associate

head coach, which is a difference. It's a significant difference. Book Richardson, from the University of Arizona, associate head coaches. There's a number of -- two guys right behind the head coach. My client is charged with bribing that associate head coach. My client is on the phone, having a conversation with the head coach, Sean Miller. And not only is he on the phone having a conversation with Sean Miller; he's talking specifically to Sean Miller about the future number one pick in the NBA draft. And during the course of that conversation, there's more than enough opportunity for my client to ask Sean Miller what it would take to get the ratings. In fact he does. And during the course of that conversation, there's never any suggestions of there being any offers, inducements, bribes, of that nature.

More significantly, your Honor, the evidence in this case, the government is aware of, establishes very clearly that Sean Miller is paying players in Arizona. I submit to the Court that's relevant, because if Sean Miller is paying players in Arizona, certainly he would have more of an influence on those players than the associate head coach, who is not paying those players. Now, if Sean Miller, as the evidence establishes --

THE COURT: I'm sorry. I want to stop you for a second. So you have information tending to establish that a head coach was paying his players.

MR. HANEY: That is correct, this particular head coach, at Arizona, yes.

THE COURT: And did your client have knowledge of that?

MR. HANEY: He did. He had knowledge of it.

THE COURT: At the time?

MR. HANEY: Yes, he did. And not only did he have knowledge of that, but my point is, if anyone had influence, if a head coach is paying the rent, if the head coach is paying the car fee, if the head coach is paying the grocery bill, certainly that individual, in theory, would have some influence over the folks who he is paying for. So if my client is charged with bribing Book Richardson, I would submit there is no evidence that he did, certainly it is worthy of cross-examination to explore, if you go on the same theory, which, again, I'm not going to articulate my theory now to the Court of how preposterous it is to believe that a coach that had been on campus for five months would somehow influence that decision. They're not even there for a year. One of them is a very, very un -- there's no accurate way of characterizing what they are. They're happier now. They go to the first semester. As soon as they're done playing basketball they leave school to prepare for the NBA draft. No coach is going to have an influence in that sort of period of time. However, if you want to follow the government's theory, which is what we're doing,

certainly the head coach, who has evidence of paying players, would be one who would impose some influence on that player, and we would, I submit to the Court, it's relevant to the defendants, and my client's motive, intent, to allow me to cross-examine that particular witness with respect to Sean Miller.

THE COURT: OK.

MR. HANEY: Thank you.

MR. MARK: Just briefly, your Honor. I mean, there might be a lot of different people who have influence over a particular player or players' decision. The question here is really whether the defendant bribed certain people who had influence over that decision. Book Richardson is one. There is no allegation here in this case that the defendant bribed, for instance, Sean Miller, the head coach at Arizona.

Now, Judge, it's outside of the sports world; if you're thinking of a drug dealer and you're considering, does that drug dealer have a relationship, you know, such that he's supplying two different distributors, the fact that there are two different distributors and he decides to supply one distributor not the other doesn't mean that the other distributor's conduct is relevant here. The question is, did he have a relationship and did he enter into a conspiracy with one of those distributors.

So I think largely this goes outside, meaning it

becomes irrelevant. And the fact that Mr. Haney is talking about two coaches engaging in systemic cheating, I think, sort of goes to the broader concern of what he is looking to do. This sort of opens the door into all sorts of other extraneous issues that are outside the scope of the sort of core issues here, which is whether the defendant did or did not engage in a conspiracy to commit bribery with these particular coaches.

THE COURT: Thank you.

I'm going to grant the government's motion. And I hasten to add, obviously, these are motions in limine and they are subject to being revisited depending on how the evidence at the trial plays out. But at this juncture I will grant the government's motion. Whether defendants had relationships with basketball coaches, including head coaches, who they did not bribe, is irrelevant to both the issues of whether defendants bribed the coaches they are alleged to have bribed and whether they intended to do so. To hold otherwise would be to suggest that if a criminal defendant conducted himself properly in some cases, he likely lacked intent when he failed to do so. But nobody only does things properly or improperly. The Second Circuit recognized this principle in *United States v. Walker*, in which it affirmed the district court's refusal to admit the honest asylum applications prepared by defendant accused of preparing false asylum applications. The Second Circuit disagreed with defendant's theory that the honest applications

disproved his, quote, fraudulent intent, holding instead that whether the defendant had prepared other nonfraudulent applications was simply irrelevant to whether the applications charged as false statements were fraudulent.

MR. MATHIAS: Your Honor, if I might clarify something?

THE COURT: Yes.

MR. MATHIAS: I just want to make sure that this ruling is limited to coaches such as Sean Miller and Will Wade. Part of Mr. Code's defense is that the coaches that were introduced to Jeff DeAngelo and Marty Blazer in Las Vegas, that list was not entirely his.

THE COURT: Not entirely whose?

MR. MATHIAS: Not entirely Mr. Code's. And so the coaches who did actually take money were in Vegas because someone else put them there, not Mr. Code. So Mr. Code does want to use as evidence the fact that the coaches he introduced did not take money, so for a different purpose than what Mr. Haney was talking about.

MR. MARK: That's really not what the government's motion is geared towards. I think what defendant Code is saying is that there are certain coaches that Mr. Code was involved with who they introduced to the undercover officer, and we're not seeking to preclude evidence related to those particular coaches by this motion.

MR. MATHIAS: I'm satisfied with that.

THE COURT: Very well.

There is another motion concerning evidence to admit as to intent that's been made by the defendants, and I don't know that I have the information necessary in order to make that determination. I think, as the government suggested, I don't -- I believe I have all of the recordings, but I don't have transcripts. I don't know anyone's voices, so I could listen to them and it would get me exactly nowhere. So it would be helpful for me to have transcripts of those recordings, and I'd be happy to review those transcripts at the appropriate time.

MR. HANEY: Thank you, your Honor.

THE COURT: Now, with respect to the most recent motion that was made, does the government wished to be heard any further?

MR. BOONE: Just briefly, your Honor. Essentially the government's argument is that Marty Blazer was not sort of better financial off having participated and cooperated with the FBI; essentially he was just reimbursed for travel expenses that were incurred as a result of his cooperation. We view that as very different from the cases that defense counsel cite, in which the cooperators at issue gained financially. In some cases they were just straight up paid as sources. In other cases it seems as if they were paid to relocate for

safety reasons. In our case, sort of the net gain was zero for our cooperator. He simply got reimbursed for travel that the FBI asked him to make, frankly, on behalf of the investigation, and therefore it was not of benefit to him.

Furthermore, as we've said, we have disclosed it. This is probably why defense counsel is raising it, because we have disclosed this to them. What they want, it appears, are the underlying documents, perhaps to get a number figure so they can cross the defendant on that. We think that's irrelevant. It doesn't matter how much the investigation cost. That was what we addressed in our motion. So to the extent that the end goal here is to sort of make a big deal that this was an investigation that cost a lot of money, frankly, number one, Marty Blazer doesn't know how much the investigation cost; number two, that's wholly appropriate.

THE COURT: And was he reimbursed dollar for dollar, which is to say if he spent $18 on lunch he got paid $18 and that's it?

MR. BOONE: Correct. Our understanding is that he did not gain anything at all financially from cooperating.

And as we pointed out, just by way of background, your Honor, the investigation, in terms of Marty Blazer's participation, lasted approximately three years. He started proffering with the government in the fall of 2014. The FBI didn't become involved until the fall of 2016. So for the

majority of the time, he was not working at the direction of the FBI but was working at the direction of our office's internal investigators and was not reimbursed for anything. He was just paying out of pocket. So we're dealing with a relatively short time frame.

THE COURT: How long, do you know?

MR. BOONE: I think it was approximately ten months. I think the FBI came in in around November 2016 and the arrests were made in September 2017.

THE COURT: I see Mr. Mathias shaking his head that he does not believe that your cooperator was paid, reimbursed dollar for dollar. Mr. Mathias?

MR. MATHIAS: I think that that did occur in some instances, but in the 3500 material we got from the government last night, it's clear that Mr. Blazer received a per diem and he knows that, if he did not spend it, he kept the balance.

THE COURT: That's true of any government employee. Correct?

MR. MATHIAS: Correct.

THE COURT: That's why we eat at McDonald's.

MR. MATHIAS: Correct. But that's not a dollar-for-dollar reimbursement. There was a balance that he kept.

And one thing to sort of explain the background of why this is important is that he was working at the behest of FBI agents who are now under investigation and are not going to be

called to testify in this case. They put all of their eggs in the Blazer basket. And we need to know everything to know how to effectively cross-examine him to determine his reliability and his truthfulness. He is a guy who has 20 years of criminal history as a fraudster. He entered into this arrangement and agreed to cooperate, certainly had no way, or no traditional way, or the way he had been making money, did not have means to do that. Instead, he was flying all over the country, staying in hotels in Las Vegas that were, I think, a thousand dollars a night, being reimbursed in cash by the FBI agents who are not going to testify in this case because they're under investigation for misuse of government funds.

THE COURT: Let me ask you this. Is there any relation between the misconduct that is being alleged against those agents and the payments that were made here?

MR. MATHIAS: I don't know. We have not been given any information that can lead us to know that. And in fact, I don't know how to argue whether or not it's relevant without seeing the underlying documentation. In their 3500 production to us and in their motion that they filed subsequently, I think they say that turning over the notes that talk about the fact that reimbursements did occur fulfills their *Giglio* obligations. I don't see how that can be when there is this underlying documentation that provides more detail that could be fertile ground for cross-examination. I just don't. And I

think we're entitled to it. That does not necessarily mean we could cross-examine him on it, but we're entitled to it, entitled to them.

THE COURT: Well, beyond the per diem, which is an interesting argument, I guess sort of conflicting with, if he only got a per diem and he was staying at the Venetian, whatever the name of the hotel is, and he's substantially underwater with respect to what he's getting reimbursed.

MR. MATHIAS: Potentially. We just don't know. Without having the information, we don't know.

THE COURT: Mr. Boone?

MR. BOONE: First of all, defense counsel is right in terms of, it was a per diem -- I think we laid that out in our letter last night, that he did get paid on a per diem basis for travel.

At any rate, to answer your question, no, there is no relation between the conduct regarding the FBI agent that defense counsel references and Marty Blazer. Frankly he's not even aware of that, at all.

Secondly, to the extent defense counsel wants to cross-examine him on his previous history of fraud, they certainly are entitled to do so and they have the information to do that. If they want to get into sort of how he became a cooperator and what he pled guilty to, they have the information to do that. That's obviously fair game. If they

want to cross him on the fact that, isn't it true you were flying around the country and the FBI was paying for it, yes. He was. That's not a secret. It's obvious.

So I'm not exactly sure what they're going to gain from getting the particular receipts of what he ate while he was in South Carolina or wherever. At the end of the day, unless there is an allegation that there is a good-faith basis to believe, on defense counsel's part, that the cooperator was doing something improper, in other words, he was stealing money from the government or he was spending more than he had been told he was allowed to, I don't know what basis there is to simply give the documents to confirm what we would explain, which is that he was reimbursed mostly dollar for dollar, although he did get a per diem on occasion.

And to the extent that he stayed in a fancy hotel in Vegas, which defense counsel references, the cooperator did not pick the hotel; the FBI picked the hotel. Part of this scheme involved the cooperator presenting himself as a financial advisor who was successful and had connections to a wealthy investor, who was interested in giving money to pay the bribes that we've talked about in the scheme. To that end --

THE COURT: Was his testimony, for example, that he stayed at a fancy Las Vegas hotel or they had a meeting on this yacht? What would his testimony be, that he was directed to do that by the agents?

MR. BOONE: Yes, correct, your Honor. On the hotel he would say he did not book his travel for that trip; the agents told him to stay where he stayed. Indeed, if pressed further, frankly, he would say that, were it left to him, he wouldn't have stayed there and probably would have stayed somewhere sort of less expensive.

In terms of the yacht, he doesn't know whose yacht it was. He doesn't know how that came to be. He was just told to show up at this place.

THE COURT: OK. I'm going to grant the government's motion, again without prejudice. It seems to me that, if the payments were made as the government represented, that it does not provide a basis for impeachment of Mr. Blazer. It may provide a basis for impeachment of the government's investigation. But I don't think that that's an appropriate basis upon which to have him turn over that information. So that motion is granted.

MR. MATHIAS: Just a point of clarification. I believe the motion was to preclude us from cross-examining Mr. Blazer on payments and reimbursements.

THE COURT: I understood the motion to be to not give you the documents.

MR. MATHIAS: OK. If that's your ruling, I'm going with that. But if we could cross-examine him.

THE COURT: Oh, yes, you can cross-examine him on

where he stayed and what he ate and whatever.

MR. MATHIAS: Thank you.

THE COURT: I think that resolves all the motions except for one, which has been filed under seal, and I will give the parties my decision on that shortly. OK?

MR. MARK: Your Honor, just, I know there are a couple of motions generally as to sort of what the government considers and argued was improper arguments or improper evidence that were raised in *Gatto*. I understand that sort of defendants in their response sort of just said that they are going to follow their ethical obligation.

THE COURT: Yes.

MR. MARK: Essentially what the government seeks is a concession that the things that are laid out in the government's motion are improper, and if those are brought up, the government will be objecting sort of regularly to things such as, if they try to put in matters such as unfairness of the rules, schools profiting from the business of college basketball, the considerations whether players did not have lots of money or that coaches were paid large salaries or evidence of generally rule breaking by others, what Judge Kaplan called the "everybody's doing it defense," that to the extent said those things get introduced here -- I mean, the government considers those to be improper matters and the government will be objecting regularly.

THE COURT: I received representations from counsel that they will not be going into those matters.

MR. HANEY: Your Honor, that is correct. This case is very narrowly focused, I think, on some particular issues, and we are not going to get into other matters.

Thank you.

THE COURT: Was there anything else, any other legal issues that the parties wanted to raise?

MR. BOONE: Your Honor, just briefly. I know Mr. Haney earlier today said that he was OK with his argument on having a ruling on whether or not they could make an entrapment defense. Just because the word "entrapment" could be sort of very loaded, we just want to make sure that defense counsel do not plan to say the word "entrapment" in allusion to an entrapment defense in their opening statement.

MR. HANEY: I have no intention, I've made that known to them a few times, I will not use the word "entrapment" in my opening statement.

THE COURT: All right.

MR. HANEY: Thank you.

MR. MATHIAS: And Mr. Code does not have that defense.

THE COURT: OK. Anything else on the legal front?

There being none, I have provided counsel with a draft of the voir dire form that I intend to use with the jury venire. I don't believe I've received any information from

defendants on proposed questions or individuals who may be mentioned or entities that may be mentioned, so I am going to give the parties some weekend homework. There are some blanks in here. I would ask that the parties provide me with that information by no later than midday Sunday so that it can be included in this form.

I did receive the government's requests. I think I included, at least in substance, almost all of what you provided. And this is a form, for the folks that are not from this district, that are used widely in this district in connection with conducting jury selection. This form will be provided to every potential juror. And I will go over this form with them as I question them. And the way that I do it is that, once I sit the jurors -- and we'll talk about that in a minute -- I ask the first potential juror every question in part one, and I ask every other juror to listen very carefully and to list those questions as to which they have an affirmative response or as to which they have an issue. And once I go through each one of those questions in part one with potential Juror No. 1, I then go to potential Juror No. 2 and I say, just tell me whether you have an issue with any of these questions, and we focus just on those questions.

The questions in part one are sort of meant to elicit responses that may provide a basis for being stricken for cause. And as those issues arise, as I question the particular

juror, if it becomes obvious that the person should be stricken for cause, they are stricken immediately and replaced immediately from someone else in the venire. And we go through that process with each potential juror until we have the number of jurors in the box that will be necessary in order to start on the peremptory strikes.

And then once we have what I refer to as a clean jury in the box, which is to say folks for whom there is no basis to strike for cause, then I turn to the part two questions, which is more, tell me about yourself and your family and your job. and I ask each juror, each potential juror, each question on part two. That gives you an opportunity to make a determination as to, this is a person that you want or don't want on the jury, so that you can exercise your peremptory challenges.

So any questions on the form?

MR. HANEY: No, your Honor.

MR. BOONE: Not from the government.

THE COURT: I'm going to ask the defendants, if they have any questions that they want included, they should get them to me, any names, etc., by no later, and the government as well, by no later than midday Sunday so that they can be included on the form.

I will take it upon myself to accept or reject any of the questions that you may want. This is not meant to be an advocacy piece. It is just meant to inform the jury as to what

the case is about and the possible bases for striking for cause.

I do want the parties to read this very carefully. And please point out to me any typographical errors, any grammatical errors that you may find. I have no pride of authorship. I'm giving this to the jury and I want them to know or believe that I am able to write English. So any typographical error of that type will be appreciated.

Now, with respect to the jury selection, I take it this case will take two weeks. Correct? Is that still the plan?

MR. BOONE: Yes, your Honor.

MR. HANEY: We believe so, your Honor.

THE COURT: OK. So do we need more than two alternate jurors?

MR. HANEY: Your Honor, we had four, I believe, in the prior trial. I would assume that perhaps more than two.

MR. BOONE: The government is fine with more than two.

THE COURT: I'm sorry?

MR. BOONE: We're OK with more than two.

THE COURT: OK. So I'm happy with two as safe in a two-week trial.

I use the strike method. So what we will do, therefore, with two alternates, each side -- rather, the defense gets ten peremptories with respect to the 12 jurors and

one peremptory with respect to the alternate jurors. The government gets six peremptories with respect to the 12 jurors and also one peremptory with respect to the alternate jurors. So we will have 32 potential jurors in the box at any one time. And for purposes of your graphing this, we will have to figure out how many we can put in the box proper and how many we will need to put in one of the first benches. But the way that we will do it is the last four potential jurors, so 29, 30, 31, 32, they're also potential alternate jurors, so that you can use your peremptories in any way that you see fit.

Any questions on that?

MR. HANEY: No, your Honor.

MR. MATHIAS: No, your Honor.

THE COURT: OK. With respect to the conduct of the trial, I propose to use the truncated day. That has become more popular in these parts. What that is is, once we get the jury selected, every subsequent day we sit from 9:30 until 2:30, giving the jurors no lunch break but two 15-minute breaks. And the way that that works out is, we go an hour and a half, 15-minute break, an hour and a half, 15-minute break, an hour and a half. And I've actually done the math on this, and if you do that five days over the course of a week, you actually get more hours than if you do a full day Monday through Thursday.

Any objection to that?

MR. MARK: No.

MR. HANEY: Not on behalf of defense, your Honor.

MR. MATHIAS: No, your Honor.

MR. BOONE: No, your Honor.

THE COURT: Very well. So that's what we will do.

With respect to, again, lawyer conduct, I don't handcuff lawyers to the podium. And I will allow you, with some reason, to go beyond the podium, especially in your presentations to the jury. With respect to time of the openings, again, I don't set strict time limits, but in a two-week trial, I wouldn't expect more than 20, 25 minutes for the opening arguments. Does any side expect to use substantially more than that?

MR. MARK: No, your Honor.

MR. HANEY: No, your Honor.

MR. MATHIAS: No, sir.

THE COURT: With respect to objections, you can stand up, say "Objection, hearsay," "Objection, asked and answered." Anything beyond that that's going to require some discussion, don't do that in front of the jury, we'll do it at sidebar.

Also, on timing, I expect the lawyers here every day at 9 o'clock, for the jury to be here at 9:30. I find that there's always something to do. So we'll use that time rather than the jury's time.

I start on time every day. If I take a 15-minute

break, it's a 15-minute break, and I send the jurors home at 2:30 like I tell them I'm going to. I make sure that we do everything possible to maintain a strict schedule, certainly from the jury's perspective. So they're here at 9:30. They leave at 2:30. They get two 15-minute breaks. I don't want the jury sitting in the box and lawyers coming in from the bathroom two or three minutes late. So please do be conscious of the fact that I start everything on time.

Any questions on any of that?

MR. BOONE: Your Honor, if your Honor knows, it would be helpful to know if you expect us to open on Monday or Tuesday.

THE COURT: In a criminal case, it usually takes the better part of a day to pick a jury, so I play it by ear. If there's an hour left at the -- Monday we'll go from 9:30, or, as soon as we get the venire, I'll expect you guys here at 9 o'clock, but as soon as we get the venire -- that could be anywhere between 10 o'clock to 10:30 -- we'll start then. We'll see how far we go, until 5 o'clock. But if it's 3:30, I would be inclined to open; if it's 4:30, I would be inclined not to open. So we'll have to play that by ear.

MR. BOONE: Thank you.

THE COURT: One other bit of instruction. I don't want parties to conduct document discovery in front of the jury. What I mean by that is, it happens frequently in trials

where a witness makes mention of a document that the lawyers believe they haven't seen or believe they haven't turned over and immediately they stop, they look at me, and they say, your Honor, we demand that this document be turned over. Don't do that. If you believe that a document hasn't been turned over, just let me know at sidebar. I say that because it is frequently the case that either the witness is mistaken or the lawyer is mistaken about what has and has not been turned over or whether the document even exists, and it would be unfair to the other side to suggest that they have been keeping documents back.

Any questions?

MR. HANEY: No, your Honor.

MR. BOONE: No, your Honor.

Just one last thing, a heads up. The defendants do need to be arraigned on the indictment. We can obviously do that Monday.

THE COURT: We can do that Monday before the venire comes up.

I don't think I have anything more. With that, we are adjourned. I will see you all Monday morning at 9. Please get me that information by Sunday. And if you need anything, I'll be around Sunday in the office.

MR. HANEY: Thank you, Judge.

(Adjourned)